Supreme Court, U.S.
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# In The Supreme Court of the United States

**UNITED STATES OF AMERICA EX REL. MICHAEL TOMLIN,**

***Petitioner,***

**v.**

**MARK GINSBURG, NATIONAL NEPHROLOGY ASSOCIATES, INC., AND JEROME S. TANNENBAUM,**

***Respondents.***

**Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Is the Sixth Circuit's interpretation of the False Claims Act's jurisdictional bar on actions "based upon" enumerated public disclosures as encompassing any action which is "supported by any part" of such disclosure, contrary to the intended meaning of the statutory term?

2. Is the Sixth Circuit's interpretation of the False Claims Act's original-source requirement for direct and independent knowledge of information, as encompassing only first-hand information, contrary to the intended meaning of the statutory term?

3. Is the Sixth Circuit's interpretation of the False Claims Act's original-source requirement that the relator have voluntarily provided the information on which the *qui tam* allegations are based to the Government before filing the *qui tam* action, as meaning that the relator must notify government before any public disclosure and must be the first source of such information to the government, contrary to the intended meaning of the statute?

## PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29(6), Petitioner Michael Tomlin makes the following statement:

The Petitioner, Michael Tomlin, is not a corporation and has no parent corporation.

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## OPINIONS AND ORDERS ENTERED IN CASE

The Opinion and Judgment of the Sixth Circuit Court of Appeals was filed on January 24, 2006. It was not recommended for full-text publication.

The Memorandum Order of the United States District Court for the Middle District of Tennessee was entered on October 1, 2004. The District Court's Order was not published.

## STATEMENT OF JURISDICTION

Petitioner seeks review of the Judgment of the Sixth Circuit Court of Appeals entered on January 24, 2006. Jurisdiction to review the judgment of the Sixth Circuit Court of Appeals by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The pertinent language from the False Claims Act is as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing

the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4).

## STATEMENT OF THE CASE

In May of 2001, Tomlin brought a claim against National Nephrology Associates, Inc., and Tannenbaum in state court for an accounting of real estate commissions pursuant to an agreement between himself and National Nephrology Associates, Inc., and for misappropriation of trade secrets developed by Tomlin and disclosed to Tannenbaum. (A-8.) In the course of the litigation, Tomlin uncovered information which led him to believe that the defendants were violating certain Medicare/Medicaid provisions. (*See* A-22 et seq.) In October of 2001, Tomlin sought to amend his complaint to add a RICO claim based on trade secret misappropriation and violation of Medicare/Medicaid laws. (RE 42 (Amended Complaint in state court action).) The court allowed the former amendment, but not the latter. (RE 1 (Ex. N to Complaint (Agreed Order Granting in Part and Denying in Part Plaintffs' Motion to

File an Amended Complaint in the state court action).) The defendants then removed the case to federal court, where Tomlin again unsuccessfully sought to add his allegations of Medicare/Medicaid law violations. (*See* A-9.) In September of 2002, the federal court dismissed the RICO claim and remanded the case to the state court. (*See* A-9.)

Sometime prior to December of 2002, Tomlin, through his attorney, met with a representative of the United States Department of Justice and voluntarily provided and disclosed to the Department the information on which Tomlin's *qui tam* action would be based. (RE 49 (Affidavit of Thomas Nebel).) On December 6, 2002, Tomlin's *qui tam* action was filed under seal in the federal district court for the middle district of Tennessee. (A-16.) In December of 2003, a year later, after the United States declined to intervene in the action, the court ordered that Tomlin's complaint be unsealed and served. (RE 15 (Notice of Declination of United States to Intervene); RE 16 (Order unsealing Complaint).)

On October 4, 2004, the federal district court dismissed Tomlin's action, on motion by the defendants pursuant to Fed. R. Civ. P. 12(b)(1). (A-6.) Tomlin timely filed his Notice of Appeal, as required under Fed. R. App. P. 4(a)(1), on January 21, 2005. (RE 106 (Notice of Appeal).) The Sixth Circuit, by unpublished Order filed on January 24, 2006, affirmed the district court's decision. (A-1.) It is from that Order that Tomlin petitions this Court for a writ of certiorari, based on Tomlin's belief that the decision is contrary to the intent of the False

Claims Act and because the decision is in conflict with decisions by other federal courts of appeal.

The basis for federal court jurisdiction over this case is 31 U.S.C. § 3732(a), which conferred subject-matter jurisdiction on the district court, this being an action under the False Claims Act, 31 U.S.C. §§ 3729 et seq.

## REASONS WHY THE COURT SHOULD GRANT A WRIT OF CERTIORARI

This Petition seeks to have the Court review the decision of the Sixth Circuit in this case, which is in conflict with the decisions of other federal courts of appeal on important matters regarding the jurisdictional standards to be applied to *qui tam* actions under the False Claims Act.

The purpose of the *qui tam* provision is to encourage private individuals who become aware of fraud being perpetrated against the federal Government to bring that information to the Government's attention. *See* H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986). The statute originally allowed actions even where they had been simply copied from federal indictments. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). In 1943, Congress amended the Act to preclude all actions where the Government already had knowledge of the fraud—even if the relator had independently uncovered the fraud and informed the Government of it. *See Wang v. FMC Corp.*, 975 F.2d 1412, 1418-19 (9th Cir. 1992). In 1986, Congress again amended the statute, this time to correct decisions, such as *United States ex rel. Wisconsin v.*

*Dean*, 729 F.2d 1100 (7th Cir. 1984), which precluded an action by a state, even though the state, itself, had conducted the investigation of fraud. *See* S. Rep. No. 345 at 13, 99th Cong., 2nd Sess. 1986, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5278.

Under the present statute, *qui tam* actions are barred where there has been a prior disclosure of the allegations or transactions constituting fraud and the *qui tam* action is based upon that publicly disclosed information, unless the person bringing the *qui tam* action is an original source of the information, in which case the action may proceed. 31 U.S.C. § 3730(e)(4)(A). Under the statutory definition, a person is an original source if he has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing the *qui tam* action. 31 U.S.C. § 3730(e)(4)(B). Accordingly, to show that the *qui tam* action is jurisdictionally barred, a challenger must show that there was a public disclosure, that the *qui tam* action is based upon the previously disclosed information, that the relator is not an original source, that is, does not have direct and independent knowledge of the information and/or did not voluntarily provide the information to the Government before filing the *qui tam* action.

The purpose of the jurisdiction bar provision is simply to prevent copycat or parasitic claims. *See, e.g., Minnesota Association of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1048-49 (8th Cir.), *cert. denied*, 537 U.S. 944 (2002); *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935, 940 (6th

Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991).

In the Court's only statement on the issue since the 1986 amendment, this Court characterized the amendment's purpose simply as

> to permit qui tam suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information.

*Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997) (deciding only issue of which version of statute applied). As explained *infra*, however, the circuit courts have interpreted the simple requirements of the statute in different ways on all elements.

The Sixth Circuit's interpretation of the statutory terms "based upon," "direct and independent," and "before filing an action" is both in conflict with decisions from other circuits and contrary to the legislative intent as evidenced by the plain meaning of the statutory terms. As a result of the differing interpretations, a person might be allowed to bring a *qui tam* action in one circuit which would be disallowed, as jurisdictionally barred, in another circuit. Because of the importance of having a uniform application of the law and because of the importance of the policies of the underlying law, this is a

case which merits the attention of this Court in order to resolve the conflict in the circuits on each of the elements.

## I. SINCE THE SIXTH CIRCUIT'S INTERPRETATION OF THE FALSE CLAIMS ACT'S JURISDICTIONAL BAR ON ACTIONS "BASED UPON" ENUMERATED PUBLIC DISCLOSURES AS ENCOMPASSING ANY ACTION WHICH IS "SUPPORTED BY ANY PART" OF SUCH DISCLOSURE IS IN CONFLICT WITH DECISIONS FROM CERTAIN OTHER CIRCUITS AND CONTRARY TO THE LEGISLATIVE INTENT, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT CONSISTENT WITH THE LEGISLATIVE INTENT.

The basic textual concern of the jurisdictional bar against claims based upon previously disclosed information is with the source of a relator's information. If the relator's source is information which someone else has already publicly disclosed, he is barred from bringing an action unless he is, himself, an original source. 31 U.S.C. § 3730(e)(4).

The Sixth Circuit, however, has interpreted the term "based upon" to mean, not actually "derived from," but rather "supported by" which, in turn, it has concluded, effectively precludes actions by individuals who base "any part of their allegations" on publicly disclosed information. *United States ex rel. Bledsoe v. Community Health Systems, Inc.*, 342 F.3d 634, 645-46 (6th

Cir. 2003); *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332-33 (6th Cir. 1998); *McKenzie*, 123 F.3d at 940.

In practical application, the Sixth Circuit has applied its interpretation to preclude any action which contains allegations, any part of which are substantially similar to any previously publicly disclosed information – even when the information was previously disclosed by the relator himself. *Jones*, 160 F.3d at 332 (rejecting relator's argument that since she was the source of information for both the prior suit and the FCA suit, the similarity of allegations was irrelevant). For other circuits that interpreted the term similarly to the Sixth Circuit, see *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 334-35 (3d Cir. 2005); *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996); *Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 567 (11th Cir. 1994); and *Wang*, 975 F.2d at 1417. *Cf. United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990) (if information on which *qui tam* suit is based is in public domain, and *qui tam* plaintiff was not a source of that information, then suit is barred). Thus, these courts find actions to be "based upon" prior disclosures even if the relator was the one who previously disclosed the information, and even if the relator also has independent or new evidence of wrongdoing. *McKenzie*, 123 F.3d at 940; *Cooper*, 19 F.3d at 567; *Wang*, 975 F.2d at 1417.

Other circuits have concluded, contrary to the Sixth Circuit's interpretation, that "based upon" does indeed mean "derived from" such that the bar applies only where the relator has actually derived the

allegations upon which his *qui tam* action is based from the prior public disclosure. *United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994); *see also Minnesota Association of Nurse Anesthetists*, 276 F.3d at 1047-49 (provision does not bar actions based on old news, so long as the relator independently discovers information already known to public, although in such situation, § 3730(d)(1) reduces size of relator's award); *United States ex rel. Reagan v. East Texas Medical Center Regional Healthcare System*, 274 F. Supp. 2d 824, 853-54 (S.D. Tex. 2003), *aff'd*, 384 F.3d 168 (5th Cir. 2004) (knowledge is independent if derived from source other than prior public disclosure).

The starting point in interpreting any statutory provision is, of course, the plain meaning of the language used. *E.g., United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 454-55 (1993). As the Second Circuit explained in a different context:

> The phrase "based on" means to be "used as a base or basis for." *Webster's Third New International Dictionary* 180 (1986) (definition 2). The relevant definition of "basis" in turn is "principal component" or "fundamental ingredient." *Id.* at 182 (definition 2). In its plain meaning, "based on" means "having as the foundation" or "arising from." *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir.2000) ( "based

> on" means "arising from" and ordinarily refers to a "starting point" or "foundation"); *Mount Vernon Fire Ins. Co. v. Creative Hous. Ltd.*, 88 N.Y.2d 347, 645 N.Y.S.2d 433, 668 N.E.2d 404, 406 (1996) ("based on" essentially equivalent to "arising out of"); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.1994) (the ordinary meaning of "based upon" is "derived from").

*Environmental Defense v. United States EPA*, 369 F.3d 193, 203 (2d Cir. 2004). The plain meaning of "based upon," then, is derived, or arising from—not merely similar to. Stated differently, an action is based upon previously disclosed information if the source of the allegations is the previously disclosed information. That an action and the publically disclosed information may be similar does not mean that one is necessarily the source of the other. To the contrary, they may well have a mutual source. The jurisdictional bar applies only to actions based upon previous disclosures—those that are parasitic.

The explanation in the Sixth Circuit's majority opinion in *Jones* illuminates the court's confusion and the obvious flaw in its reasoning, which is based on its erroneous interpretation of the meaning of the term "based upon":

> Neither the concurrence nor the Fourth Circuit opinion cited by the concurrence, *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.1994), explain why a Congress that was intent on

> eliminating parasitic *qui tam* actions would have provided an exception that allows a relator who qualifies as an original source to maintain an action actually derived from public disclosures.

160 F.3d at 332. In fact, the Sixth Circuit has it backwards because its interpretation negates the source inquiry. If the term "based upon" is properly interpreted to mean derived from, as a *source*, then Congress's intent to eliminate parasitic actions is perfectly consistent with the original-source exception, as the statute would bar all actions derived from prior public disclosures—which an action would not be if the relator is himself an original source. *Stinson*, 944 F.2d at 1160 (relator who would not have learned of the information absent public disclosure did not have "independent" information within the statutory definition of "original source"). The Sixth Circuit's conclusion that the "derived-from" interpretation would render the exception superfluous, likewise, is backwards. *See Jones*, 160 F.3d at 332. The importance of the exception is that it adds the requirement that the relator provide his information to the Government before he brings a *qui tam* action By interpreting "based upon" to mean merely "essentially similar to" or "supported by" in any part, the Sixth Circuit bars original source actions which Congress clearly did not intend to bar.

The Seventh Circuit's interpretation is more consistent with both the plain language of the statute and the legislative intent. As the Seventh Circuit has characterized the matter, the bar applies only to a relator

who would not have learned of the information upon which his *qui tam* action is based absent the public disclosure. *Houck ex rel. United States v. Folding Carton Admin. Commission*, 881 F.2d 494, 505 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990). The Seventh Circuit's view is that the jurisdictional requirement was intended to insure that *qui tam* actions by disinterested outsiders who simply stumble upon interesting information which has been publicly disclosed by others should be barred. *See* 881 F.2d at 505. *Houck* stands for the simple proposition that where a relator would not have learned of the information but for its public disclosure, the relator's action is clearly parasitic and clearly within actions intended to be barred. On the other hand, where the relator has learned of the information from a source other than the public disclosure, his action is not parasitic, although it may come later and although the information may be duplicative.

While Congress wished to preclude parasitic actions, it did not wish to bar persons with direct, independent information just because they have, or someone else has, already publicly disclosed the information. So viewed, the "based-upon" bar and the "independent-knowledge" exception are but two sides of the same coin, with the additional requirement, for the exception to apply, that the relator have also brought the information to the Government before bringing the *qui tam* action. In simple terms, the plain import of the based-upon provision is that if the relator's knowledge of information showing fraud came from someone else's public disclosure, his action should be barred; on the other hand, if his knowledge came from a source other

than a prior public disclosure, his action should not be barred, if he meets the criteria for an original source.

As alluded to *supra*, a number of courts have interpreted "independent knowledge" to mean knowledge "not derived from," or not itself dependent on a prior public disclosure. *E.g., Minnesota Association of Nurse Anesthetists*, 276 F.3d at 1048; *United States ex rel. Springfield Terminal Railway v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994). The Sixth Circuit, however, has interpreted the term to mean not based on public disclosure. *McKenzie*, 123 F.3d at 941 (quoting *Stinson*, 944 F.2d at 1160). As a practical matter, then, the based-upon and the independent-knowledge inquires are the same.

If a *qui tam* action is not based upon prior disclosed information, there is no jurisdictional bar and there is no need to proceed to the original source analysis.[1] Although the Sixth Circuit did not separately discuss the based-upon requirement, that the court assumed that the bar applied is clear from the fact that it went on to address the original-source exception. In the present case, while Tomlin's information was duplicative of information in his disallowed amended complaint, he was not a disinterested outsider who stumbled upon a court file, but, rather, it was he who uncovered the information and made the original disclosure of suspected fraud. Tomlin, therefore, does not come

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[1]Similarly, as the Sixth Circuit acknowledges, if there has been no public disclosure, there is no jurisdictional bar. *McKenzie*, 123 F.3d at 938.

within the jurisdictional bar as properly characterized by those circuits which interpret the bar as foreclosing only actions in which the relator gained his knowledge from a prior public disclosure by some other person, rather than through his own independent efforts. Assuming that Tomlin's attempted amended complaint constituted a public disclosure, the Sixth Circuit erred in affirming the district court's finding that Tomlin's *qui tam* action was barred because the alleged fraud had been disclosed before Tomlin filed the action, and a decision by this Court is needed to clarify the proper standard for the jurisdictional bar and, in so doing, to resolve the conflict in the circuits.

## II. SINCE THE SIXTH CIRCUIT'S INTERPRETATION OF THE FALSE CLAIMS ACT'S ORIGINAL-SOURCE REQUIREMENT FOR DIRECT AND INDEPENDENT KNOWLEDGE OF INFORMATION AS ENCOMPASSING ONLY FIRSTHAND INFORMATION IS IN CONFLICT WITH THE DECISIONS FROM CERTAIN OTHER CIRCUITS AND CONTRARY TO THE INTENDED MEANING OF THE TERM, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT CONSISTENT WITH THE LEGISLATIVE INTENT.

The term "direct," when used as an adjective, generally means an immediate connection or relation, rather than operation through a medium; in appropriate circumstances, it can also mean without intervening

medium, agency, or influence. Black's Law Dictionary 413 (5th ed. 1979).

The Sixth Circuit has interpreted the term to mean "marked by absence of intervening agency." (A-3.) *McKenzie*, 123 F.3d at 941. Other circuits adopting the same definition include the D.C. and Third Circuits. *See Springfield Terminal Railway*, 14 F.3d at 656-57; *Stinson*, 944 F.2d at 1160. Since the term "intervening agency" generally applies to tort actions and actually refers to an independent act or cause which supersedes an original act or cause, shifting responsibility for an injury to the latter act or cause, it is not readily evident how it applies in the context of information. *See* Black's Law Dictionary 736. The courts that have adopted that meaning, further, appear to have applied the term to require that no part of a relator's information can have been obtained from anyone else. *See Stinson*, 944 F.2d at 1160 (information on manner in which defendant processed claims was not direct because it came through employee responsible for notation on memorandum and discovery procedure by which memorandum was produced).

Other circuits, however, have characterized direct knowledge more broadly to include personal knowledge that is essential to the relator's conclusion that a fraud has been committed, even if the information supporting that conclusion was obtained from other people, whether through documents or interviews, *see Springfield Terminal Railway*, 14 F.3d at 656-57, knowledge obtained through the relator's own investigation, *see Stinson*, 944 F.2d at 1160, or knowledge that was obtained by virtue of a

relator's direct relationship to and interest in the matter.[2] *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247, 1256-58 (S.D. Fla. 1989).

Certainly, the jurisdictional bar is intended to eliminate actions by those who present only secondhand information, speculation, or general information. *See United States ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162-63 (10th Cir. 1999) (citing *United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 163 F.3d 516, 526 (9th Cir. 1999)). It reflects the congressional intent to disallow parasitical suits in which the relator has contributed nothing. *Minnesota Association of Nurse Anesthetists*, 276 F.3d at 1049.

Without question, information obtained by firsthand observation or experience provides direct knowledge. *See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir.), *cert. denied*, 522 U.S. 865 (1997); *United States ex rel. Devlin v. California*, 84 F.3d 358, 361 (9th Cir.), *cert. denied*, 519 U.S. 949 (1996) (mere verification of information provided by another does not constitute direct knowledge). Realistically, however, aside from being the actual perpetrator of a fraud or his colleague, investigation is the way a person

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[2]Under principles of agency, of course, all information obtained by an agent belongs to his principal. *See, e.g., Mathieson Alkali Works v. Arnold, Hoffman & Co.*, 31 F.2d 1, 6 (1st Cir. 1929); *Conner v. Craig*, 216 F. 729, 733 (4th Cir. 1914); *see also Marshall v. Sevier County*, 639 S.W.2d 440, 446 (Tenn. Ct. App. 1982).

gains information, and the results of one's own investigation should qualify as direct knowledge. As one federal district court noted,

> it is difficult to imagine how a relator could gain information more directly than through independent perusal of inanimate public records.

*United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 255 F. Supp. 2d 351, 379 (E.D. Pa. 2002). In fact, some circuits have concluded that a relator does not have to have personal knowledge of all elements of the fraud but, rather, only of any essential element. *E.g., Minnesota Association of Nurse Anesthetists*, 276 F.3d at 1048; *Springfield Terminal Railway*, 14 F.3d at 656-57.

Where publicly disclosed information does not, without more, indicate fraud, such that the relator has to bridge the gap by his own efforts or experience, including, for example, personal knowledge of the proceedings or interviews with persons with knowledge, the relator's knowledge is direct and independent. *Springfield Terminal Railway*, 14 F.3d at 657. As the court explained:

> On the basis of plain meaning, then, we find that § 3730(e)(4)(B) does not require that the *qui tam* relator possess direct and independent knowledge of *all* of the vital ingredients to a fraudulent *transaction*. Thus, to revert to previous analysis, the term "information" in the "original source"

> context is not confined to the *combination* of X and Y, the two essential elements to the transaction. This distinction also conforms to our understanding of the purposes of the Act. Rare indeed would be the case in which relators could gain "original source" status, if such were the standard, because the misrepresented state of affairs, *e.g.* X, would almost always have been disclosed to the government independently by the alleged defrauder. If we were to equate "information" with "transaction," we would undo . . . Congress' careful choice of wording.

*Id.* (court's emphasis). The court concluded that because the relator had started with innocuous public information and had completed the equation with information independent of any preexisting public disclosure, he satisfied the requirements for an original source. *Id.*

While it may well be that the "paradigmatic" original source is a whistleblowing insider, there is nothing in the statute to indicate that would be the only possible original source. The original-source exception is intended to allow actions by relators who have put two and two together, based on information they have obtained through their own efforts.

In the present case, Tomlin conducted his own investigation into the conduct of the defendants and, on the basis of the information he obtained, concluded that they were involved in fraud on the federal Government.

The Sixth Circuit erred in concluding that Tomlin's action was jurisdictionally barred because he did not have firsthand knowledge of the fraud, and a decision by this Court is necessary to establish the proper standard and to resolve the conflict in the circuits.

## III. SINCE THE SIXTH CIRCUIT'S INTERPRETATION OF THE FALSE CLAIMS ACT'S ORIGINAL-SOURCE REQUIREMENT THAT THE RELATOR HAVE VOLUNTARILY PROVIDED THE INFORMATION ON WHICH THE *QUI TAM* ALLEGATIONS ARE BASED TO THE GOVERNMENT BEFORE FILING THE *QUI TAM* ACTION AS MEANING THAT THE RELATOR MUST NOTIFY THE GOVERNMENT BEFORE ANY PUBLIC DISCLOSURE HAS BEEN MADE AND MUST BE THE FIRST SOURCE OF SUCH INFORMATION TO THE GOVERNMENT IS IN CONFLICT WITH THE DECISIONS FROM CERTAIN OTHER CIRCUITS, HAS NO TEXTUAL BASIS, AND IS CONTRARY TO DICTA BY THIS COURT, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT CONSISTENT WITH THE LEGISLATIVE INTENT.

To come within the exception as an original source, a relator must be a "source" as well as an "original" source, the latter requiring that the relator have direct and independent information, discussed *supra*, and

the former requiring that the relator have voluntarily provided the information to government before filing a *qui tam* action. As referenced *supra*, this Court has stated simply that *qui tam* actions are authorized, even when based on information already in the government's possession, except when the action is based on information that has been publicly disclosed and the relator is not an original source of the information. *Schumer*, 520 U.S. at 946.

The Sixth Circuit has imposed the additional requirement that a relator have informed the federal government of suspected fraud prior to the public disclosure of the information and that the relator have been the first source of that information. *Bledsoe*, 342 F.3d at 646; *Jones*, 160 F.3d at 3323; *McKenzie*, 123 F.3d at 940 (recognizing that courts that had considered issue were split).[3] The D.C. Circuit and the Tenth Circuit have similarly concluded. *Findley*, 105 F.3d at 690; *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568 (10th Cir. 1995).

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[3]The Tenth Circuit, which the Sixth Circuit relied on, reasoned that because a prior disclosure "sufficiently alerts" the Government to the possibility of fraud, the Government has no need for the assistance of others. *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568 (10th Cir. 1995). Given the broad interpretation of what constitutes a public disclosure, the Tenth Circuit's reasoning is seriously flawed. Disclosure of information in a state court proceeding about fraud against the federal Government, for example, without more, hardly notifies the federal Government of anything.

As the Eighth Circuit has noted, however, the rule adopted by the Sixth Circuit has no textual basis in the statute. *Minnesota Association of Nurse Anesthetists*, 276 F.3d at 1050. In declining to adopt the rule or the justification for it, that a relator has no utility to the Government once public disclosure has been made, the court explained:

> [A]s we have seen, through the original source provisions Congress chose to reward persons who discovered and revealed fraud, rather than confiscating their claims. At the same time, Congress limited that beneficence by denying the bounty even to those who uncovered the fraud unless they had revealed it to the government before filing suit. Sec. 3730(e)(4)(B). We would change the balance Congress struck if we were to further restrict the class of those whose discoveries had been made public but who were nevertheless permitted to proceed as relators. We decline to adopt the proposed additional requirement.

*Id.* at 1051. The Third, Fourth, Tenth, and Eleventh Circuits, similarly, have concluded that an additional burden requiring a relator to have disclosed information to the federal Government prior to any public disclosure of that information is contrary to the plain language of the statute. *Fine*, 99 F.3d at 1006-07; *Siller*, 21 F.3d at 1355; *Stinson*, 944 F.2d at 1160; *Cooper*, 19 F.3d at 568 n.13 (finding that requirement of disclosure to Government

prior to public disclosure does not appear in plain language of statute and that no support for it exists in legislative history).

In the present case, the Sixth Circuit held that Tomlin cannot qualify as an original source because he did not disclose his information to the Government before disclosing it in his state suit. (A-5.) It was Tomlin, however, who originally disclosed the information on which his *qui tam* action is based, and Tomlin was the only source of that information to the Government. *See United States ex rel. Butler v. Magellan Health Serv., Inc.*, 74 F. Supp. 2d 1201, 1209-12 (M.D. Fla. 1999) (where relator had disclosed information in state court complaint and to media by his own prerogative and had provided the information to federal Government before filing *qui tam* action, he qualified as original source). Tomlin, furthermore, disclosed the information to the Government before bringing his *qui tam* action. That he did not inform the Government of the fraud prior to including the information is his proposed amended complaint in state court should not bar his *qui tam* action. The Sixth Circuit erred in holding that his action was barred for failure to inform the Government before attempting to amend his state court complaint, and a decision from this Court is necessary to establish the correct standard and to resolve the conflict in the circuits.

## CONCLUSION

In view of the reasons and authorities set forth above, Petitioner Tomlin respectfully requests that his Petition for Writ of Certiorari be granted, that the judgment of the Sixth Circuit Court of Appeals be reversed, and that the matter be remanded for further proceedings.

Respectfully submitted,

Michael Tomlin
Pro se

No. _____

# In The Supreme Court of the United States

**UNITED STATES OF AMERICA EX REL. MICHAEL TOMLIN,**

***Petitioner,***

**v.**

**MARK GINSBURG, NATIONAL NEPHROLOGY ASSOCIATES, INC., AND JEROME S. TANNENBAUM,**

***Respondents.***

**Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## APPENDIX

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FILED
JAN 24 2006
LEONARD GREEN, Clerk

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

No. 05-5270

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | |
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| UNITED STATES OF AMERICA, ex rel. MICHAEL TOMLIN, | ) |
| Plaintiff-Appellant, | ) |
| v. | ) ON APPEAL |
| | ) FROM THE |
| ROYCO, INC., d/b/a ESRD LABORATORY; MARK GINSBURG; SCOTT GINSBURG; TENNESSEE NATIONAL NEPHROLOGY ASSOCIATES, INC.; JEROME S. TANNENBAUM, | ) UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE |
| Defendants-Appellees. | ) |

ORDER

Before: NELSON, DAUGHTREY, and ROGERS, Circuit Judges.

Michael Tomlin, proceeding pro se, appeals a district court judgment dismissing his qui tam suit filed pursuant to the False Claims Act. 31 U.S.C. § 3729, et seq. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 2002, Tomlin filed suit against Royce, Inc., d/b/a ESRD Laboratory; Mark Ginsburg; Scott. Ginsburg; National Nephrology Associates, Inc.; and Jerome S. Tannenbaum, asserting that: 1) the defendants had violated the False Claims Act by violating or conspiring to violate the Medicare and Medicaid anti-kickback law through illegally referred laboratory work; and 2) National Nephrology Associates and Tannenbaum had violated the False Claims Act by making false statements to the Federal Aviation Administration to obtain permission to fly on September 11, 2001, after other aircraft were grounded. The United States declined to intervene, and the defendants moved to dismiss the suit. The district court did so, reasoning that it lacked subject matter jurisdiction because the alleged fraud had been publicly disclosed before the suit was filed and because Tomlin was not an original source of the allegations. *See* Fed. R. Civ. P. 12(b)(1).

In his timely appeal, Tomlin argues that he is an original source and had voluntarily provided information to the government before filing suit. He moves for miscellaneous relief, and the defendants request oral argument.

As an initial matter, we note that Royce, Inc. and Scott Ginsburg were previously dismissed by this court as appellees. Thus, the instant order does not apply to them.

Upon de novo review, we conclude that the district court properly dismissed the suit for lack of jurisdiction. *See United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935,938 (6th Cir. 1997).

Unless the relator is an original source, a federal court lacks jurisdiction over a suit filed pursuant to the False Claims Act where the suit is based upon allegations that have been publicly disclosed. *See* 31 U.S.C. § 3730(e)(4)(A); *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 330-31 (6th Cir. 1998); *McKenzie*, 123 F.3d at 938. To be an original source, one must have "direct and independent knowledge" of the information underlying the complaint and must have voluntarily provided the information to the government before public disclosure occurs and before filing a qui tam suit. *See* § 3730(e)(4)(B); *Jones*, 160 F.3d at 333-34. Knowledge is "direct" if it is "'marked by absence of intervening agency,'" and "independent" if not based on public disclosure. *McKenzie*, 123 F.3d at 941 (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991)).

The district court properly dismissed the suit for lack of jurisdiction. First, Tomlin does not dispute that his suit is based on allegations that were previously disclosed. Tomlin previously disclosed his allegations of

fraud when he sought leave to add RICO claims to a state court case he had filed against National Nephrology Associates and Tannenbaum in 2001. Filing documents with a court constitutes public disclosure for purposes of the False Claims Act. *McKenzie*, 123 F.3d at 939.

Second, Tomlin contends on appeal that he is an original source because his information did not come from public disclosures but instead came from his attorney's telephone conversation with an ESRD receptionist, his attorney's conversation with Mark Ginsburg, a letter by Mark Ginsburg, his attorney's interview of a former officer of National Nephrology Associates, Tomlin's own conversations with current and former officers of National Nephrology Associates, and Tannenbaum's confidential property division and settlement agreement from a divorce proceeding. In response, the defendants point out that Tomlin cited to public sources as well in his complaint.

We decline to resolve whether the public sources of information listed in Tomlin's complaint supported his allegations of fraud or merely provided innocuous information insufficient to bar his suit. *See Jones*, 160 F.3d at 331. Even if Tomlin's knowledge of the relevant information came from sources listed in his brief and was obtained independently of public disclosure, his knowledge was not "direct." Rather, his knowledge was obtained from intermediaries: employees of National Nephrology Associates and the discovery process. *See Prudential Ins. Co.*, 944 F.2d at 1160-61. Tomlin simply had no firsthand information.

Finally, Tomlin cannot qualify as an original source because he did not disclose his information to the government before publicly disclosing it in his state suit in 2001. *See Jones*, 160 F.3d at 333-34.

Accordingly, we deny the defendants' request for oral argument, we deny all pending motions, and we affirm the district court's judgment. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/

Clerk

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**
**AT NASHVILLE**

| | | |
|---|---|---|
| **THE UNITED STATES OF AMERICA *ex rel.* MICHAEL TOMLIN,** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | **Case No. 3:02-1179** |
| **ROYCO, INC. d/b/a ESRD LABORATORY, MARK GINSBURG, SCOTT GINSBURG, NATIONAL NEPHROLOGY ASSOCIATES, INC. and JEROME S. TANNENBAUM.** | ) | **Judge Nixon** |
| **Defendants.** | ) | |

**MEMORANDUM ORDER**

Pending before the Court are Defendants National Nephrology Associates, Inc. and Jerome S. Tannenbaum's Motion to Dismiss (Doc. No. 33), Defendant Mark Ginsburg's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) and 9(b) (Doc. No. 39), and Defendant Mark Ginsburg's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1) (Doc. No. 41). Also before the Court is Plaintiff's Counsel's Motion to Withdraw as Counsel and for Extension of Time to Respond to Discovery (Doc. No. 63). For the reasons stated herein, Defendants' motions to dismiss are GRANTED, and accordingly, this matter is DISMISSED WITH PREJUDICE. Counsel for Plaintiff's motion to

withdraw and for an extension of time to respond to discovery is, thus, dismissed as MOOT.

This document was entered on the docket in compliance with Rule 53 and/or Rule 79(a), FRCP on 10/4/04 By: ___

## I. Procedural History

On December 6, 2002, Plaintiff Michael Tomlin ("Tomlin") filed a qui tam action against Royco, Inc. d/b/a/ ESRD Laboratory, Mark Ginsburg, Scott Ginsburg, National Nephrology Associates, Inc. and Jerome S. Tannenbaum ("Defendants"). The Complaint alleges that Defendants violated the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq., by violating or conspiring to violate the Medicare and Medicaid anti-kickback law, 42 U.S.C. § 1320a-7b, through improperly referred laboratory work. The Complaint also alleges that Defendants National Nephrology Associates, Inc. and Jerome S. Tannenbaum made misrepresentations to the Federal Aviation Administration in order to secure permission to fly back to Nashville on September 11, 2001, after the attacks on the World Trade Center and the Pentagon. Pursuant to 31 U.S.C. § 3730(b)(2),[4] the

---

[4] "A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the government pursuant to Rule 4(d)(4) [now Rule 4(i)] of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and

Complaint was file under seal and served upon the United States, but the government declined to intervene in the action. Tomlin thereafter served the Complaint on the Defendants in March of 2003.

Defendants now move for dismissal of Tomlin's claims, asserting, inter alia, that Tomlin is jurisdictionally barred from bringing suit under the FCA pursuant to 31 U.S.C. § 3730(e)(4), because Tomlin's suit is based upon information publicly disclosed prior to the filing of this qui tam action, of which Tomlin was not the original source.

## II. FACTS

On May 21, 2001, Tomlin sued Defendants National Nephrology Associates, Inc. and Jerome S. Tannenbaum in the Circuit Court for Davidson County ("*Tomlin I*") seeking an accounting of real estate commissions arising from an independent contractor agreement executed by Defendant National Nephrology Associates, Inc. and Tomlin on April 1, 1999. Tomlin also sued these two Defendants in the Tomlin I lawsuit for allegedly misappropriating a purported trade secret that Tomlin alleges to have developed and disclosed to Defendant Tannenbaum.

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shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information." 31 U.S.C. § 3720(B)(2).

On October 18, 2001, Tomlin sough leave to amend his complaint in the Tomlin I suit to allege violations of the Racketeer Influenced and Corrupt Organizations Act (" RICO"). In the proposed amended complaint, Tomlin raised the same allegations as he does in this *qui tam* action, namely that the Defendants National Nephrology Associates, Inc. and Jerome S. Tannenbaum violated Medicare and Medicaid laws and that they acted improperly with regard to a flight to Nashville on September 11, 2001.

The circuit court allowed Tomlin to add a RICO claim regarding trade secret misappropriation, but declined to allow Tomlin to add his RICO claims regarding violations of the Medicare and Medicaid laws and the September 11, 2001 flight. Defendants then removed the case to federal court and filed a motion to dismiss the RICO claim. (See *Tomlin v. Imrac Corp.*, 3:02-0016, J. Haynes). Tomlin again sought to interject the allegations regarding violations of the Medicare and Medicaid laws and the September 11, 2001 flight through various motions. On September 20, 2002, Judge Haynes granted Defendants' motion to dismiss the RICO claim and remanded *Tomlin I* to the circuit court. Tomlin then instituted the present *qui tam* action ***under seal*** on December 6, 2002, against Defendants. (Doc. No. 81 and 82 in No. 3:02-0016).

## III. STANDARD OF REVIEW

The Court's analysis under a motion to dismiss is narrow and limited. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is

entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Moreover, in reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, a court must review the complaint in the light most favorable to the plaintiff, construing all of its allegations in his or her favor. *Id.* A complaint should not be dismissed under Rule 12(b)(1) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [his or her] claim which would entitle [him or her] to relief." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). *See also Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley*); *G.M. Eng'rs & Assoc. v. West Bloomfeld Township*, 922 F.2d 328,330 (6th Cir. 1990) (citing *Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987) ('[t]his court must accept all of the plaintiffs factual allegations as true and determine whether any set of facts consistent with the allegations would entitle the plaintiff to relief'). The Court finds that Defendants' grounds for dismissal under Rule 12(b)(1) are dispositive of this action; thus, the Court finds it unnecessary to address Defendants' Rule 12(b)(6) grounds for dismissal.

## IV. SUBJECT MATTER JURISDICTION

The FCA contains a *qui tam* provision that permits a private individual to bring a civil action for violations of § 3729 as a "relator" on behalf of the United States. 31 U.S.C. § 3730(b)(1). Under the FCA, the Government may recover treble damages from one who has committed a fraud upon the Government, and the individual who

brought the action may receive up to 30 percent of the money recovered. 31 U.S.C. § 3730(d)(2). Defendants contend that Plaintiff is jurisdictionally barred from serving as a relator.

Section 3730(e)(4) restricts the subject matter of the courts in relation to qui tam actions brought under the FCA. The FCA contains the following jurisdictional bar to a potential relator:

> 4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

FCA, 31 U.S.C. § 3730(e)(4). "The jurisdictional requirements are designed to restrict the number of persons who can bring *qui tam* actions and thereby avoid parasitic suits." *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 940 (6th Cir. 1997).

In *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 330-31 (6th Cir. 1998), the Sixth Circuit expounded a four-part test in determining whether a relator's case is jurisdictionally barred by § 3730(e)(4). The Jones court stated:

> It is useful to break the inquiry down into its elements:
>
> (A) whether there has been a public disclosure in a criminal, civil or administrative hearing; or congressional, administrative, or government report, hearing, audit, or investigation; or from the news media; (B) of the allegations or transactions that form the basis of the relator's complaint; and (C) whether the relator'[s] action is "based upon" the publicly disclosed allegations or transactions. If the answer is "no" to any of these questions, the inquiry ends and the *qui tam* action may proceed. If the answer to each of the above questions is "yes," then the final inquiry is (D) whether the relator qualifies as an "original source" under § 3730(e)(4)(B), which also would allow the suit to proceed.

*Id.* at 330.

Tomlin does not dispute that there has been a prior public disclosure of the allegations in this *qui tam* action and that this action is "based upon" the prior publicly disclosed allegations. However, Tomlin maintains that he is the original source of the information and as such is allowed to proceed with this *qui tam* action. Defendants contend that Tomlin is not an original source because he lacks direct knowledge of the information on which the publicly disclosed allegations are based. 31 U.S.C. § 3730(e)(4)(B). The Sixth Circuit Court of Appeals defines "direct" as firsthand knowledge. *McKenzie*, 123 F.2d at 942-43. Tomlin admittedly bases his allegations on information he obtained by investigation, through either individuals with purported firsthand knowledge or through court documents such as depositions. Tomlin possesses no firsthand knowledge of the information upon which his allegations are based. Accordingly, the Court finds that Tomlin was not the original source of the publicly disclosed allegations that pre-date the filing of this suit.

Alternatively, even if Tomlin had direct and independent knowledge of the information on which the publicly disclosed allegations are based, he would still not be an "original source." In addition to the requirement that a relator must have provided information to the government prior to filing his FCA suit, the Sixth Circuit has held that a relator must also provide the government with the information upon which the allegations are based prior to any public disclosure. *See id.* at 942 (adopting the approach of *United*

*States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir.), *cert. denied*, 118 S. Ct. 172 (1997)). The *McKenzie* court reasoned that this rule is necessary because one is not a true whistle blower unless he or she is responsible for alerting the government to the alleged fraud before such information is in the public domain. *Id.* Tomlin has not presented any evidence that he provided the government with the information upon which his allegations are based prior to his public disclosure of the information in *Tomlin I* on May 21, 2001. Therefore, Tomlin is not an "original source" because, although he did provide information about Defendants' allegedly fraudulent conduct to the federal government prior to filing this *qui tam* action, he failed to disclose these allegations to the federal government prior to his public disclosure of the allegations in *Tomlin I*.

The Court finds Tomlin's remaining arguments without merit. Accordingly, the Court finds that it lacks subject matter jurisdiction over this action because Tomlin's *qui tam* action is based upon the prior public disclosure of the allegations of fraud against Defendants, and Tomlin does not qualify as an original source of the publicly disclosed allegations due to his lack of firsthand knowledge of the information upon which the allegations are based and his failure to bring the information to the federal government prior to the public disclosure.

## V. CONCLUSION

Based on the foregoing reasons, Defendants' Motions to Dismiss are hereby GRANTED. Accordingly, this case shall be DISMISSED WITH PREJUDICE.

Counsel for Plaintiff's motion to withdraw and for an extension of time to respond to discovery is, thus, dismissed as MOOT.

It is SO ORDERED.

Entered this the 1st day of October, 2004.

/s/
JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENN.

DEC 06 2002

By _____
DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**

| | |
|---|---|
| **THE UNITED STATES OF AMERICA, *ex rel.* MICHAEL TOMLIN,** | ) |
| **Plaintiffs,** | ) |
| **vs.** | ) **Case No. 302 1179** |
| **ROYCO, INC. d/b/a ESRD LABORATORY, MARIE GINSBURG, SCOTT GINSBURG, NATIONAL NEPHROLOGY ASSOCIATES, INC. and JEROME S. TANNEBAUM,** | ) **JUDGE CAMPBELL** ) **JUDGE BROWN** ) **JURY DEMAND** |
| **Defendants.** | ) |

## COMPLAINT

Filed *in camera* pursuant to 31 U.S.C. § 3730(b)(2). Comes now the Plaintiff, United States of America, ex rel. Michael Tomlin, and for causes of action against the Defendants states as follows:

## JURISDICTION AND VENUE

1. This is a *qui tam* action brought on behalf of the United States of America by Michael Tomlin pursuant to the Federal False Claims Act, 31 U.S.C. § 3730 for violations by defendants of the False Claims Act, 31 U.S.C. § 3729 et seq. which prohibits persons or entities from defrauding the United States.

2. 31 U.S.C., § 3729(a), provides:

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud

the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person...

3. This Court possesses jurisdiction under 28 U.S.C. § 1331, in that this is a civil action arising under the laws of the United States.

4. This Court is the proper venue for this action under 28 U.S.C. § 1391(b) and (c), in that NNA and ESRD are subject to personal jurisdiction at this time in this judicial district and is therefore deemed to reside in this judicial district, and in that a substantial portion of the events or omissions giving rise to the claim herein occurred in this judicial district.

## THE PARTIES

5. Royco, Inc. is a Florida corporation with a principal address of 830 NW 57th Court, Ft. Lauderdale, FL 33309.

6. The registered agent for service of process of Royco, Inc. is Rikki Robinson, 19665 Oakbrook Court, Boca Raton, FL 33434.

7. Ricki Robinson ("Robinson") is the sister of defendants Mark Ginsburg and Scott Ginsburg, is the agent for service of process of defendant ESRD, and is an officer/director of ESRD.

8. Robinson's residence is 800 Monarch Drive, Lacanda, California 91011.

9. Royco, Inc. is registered in Florida to do business as ESRD Laboratory ("ESRD" ).

10. "ESRD" is the acronym for the medical condition known as End Stage Renal Disease.

11. ESRD operates nationwide in providing laboratory testing services medically necessary and required for kidney patients receiving dialysis treatment.

12. Patients requiring such treatment must submit to the treatment at frequent intervals, generally weekly or more often, and associated testing is required on an ongoing basis.

13. ESRD provides the vast majority of laboratory testing services required of dialysis patients of National Nephrology Associates, Inc.

14. Mark Ginsburg is a resident of the State of Florida with an office at 831 North West 57th Court, Fort Lauderdale, Florida, 33309, and a personal residence at 19665 Oakbrook Court, Boca Raton, Florida 33434.

15. Mark Ginsburg is the head of ESRD.

16. Scott Ginsburg, Mark Ginsburg's brother, is a resident of Texas with an address of 433 East Las Colinas Blvd., #140, Irving, Texas 75039, and at 4707 Park Lane, Dallas, Texas 75220.

17. Scott Ginsburg, who has no medical credentials, is registered with the Florida Secretary of State as an officer/director of Royco, Inc., whose (Royco, Inc. 's) principal office and place of business is in Florida, not Texas.

18. Defendant National Nephrology Associates, Inc., defendant, ("NNA") is a Delaware corporation registered to do business in the State of Tennessee, whose primary place of business is located at 230 Great Circle Road, Suite 218, Nashville, Davidson County, Tennessee, and whose agent for service of process in Tennessee is Leif Murphy, 230 Great Circle Road, Suite 218, Nashville, TN 37228.

19. NNA is engaged in the business of providing medical treatment for patients with renal disease on an out-patient basis in dialysis clinics operated in some fifteen states.

20. NNA also provides acute dialysis services to hospitals.

21. NNA is by far the largest provider of referrals to ESRD, and ESRD performs the vast majority of laboratory testing services required for NNA patients.

22. Jerome S. Tannenbaum (hereinafter "Tannenbaum") is an individual, a citizen of the United States and the State of Tennessee, and a resident of Davidson County, Tennessee.

23. Defendant Tannenbaum is a member of the Board of Directors and Chief Operating Officer of NNA and owns a significant share in NNA.

24. Michael Tomlin (hereinafter "Tomlin"), is a resident and citizen of the United States and the State of Tennessee.

## FALSE CLAIMS: MEDICARE

25. NNA operates dialysis clinics in fifteen (15) states for patients suffering from end stage renal disease, or kidney failure.

26. "End Stage Renal Disease" is defined as the failure or near complete failure of the kidneys to function to excrete waste, concentrate urine, and regulate electrolytes.

27. Dialysis or kidney transplantation are the only treatments for End Stage Renal Disease.

28. According to MEDLINEplus, in the United States, 300,000 patients are on chronic dialysis.

29. According to the NNA web page:

> National Nephrology Associates (NNA) is a physician-oriented dialysis company that owns and operates out-patient hemodialysis clinics for the treatment of end-stage renal disease (ESRD). The company is a fully-integrated provider of dialysis services, providing treatment in acute-care hospitals and in facilities that have been acquired or developed by NNA. NNA clinics also provide home training for qualified patients.
>
> NNA partners with physicians and hospitals to provide capital resources, industry expertise, an experienced management team and integrated, efficient information systems throughout its clinic

system. The clinics are managed by NINA to allow physicians more time in their practice of medicine. NNA also offers complete access to patient records, information on best clinical practices, and assistance with financial and reimbursement issues as well as supply contracts. http://www.nnacorp.com/aboutus-approach.htm

30. The United States pays the medical costs for approximately 80% or more of NNA's dialysis patients.

31. In connection with providing chronic dialysis services, physicians must obtain routine laboratory work for their end stage renal patients.

32. ESRD is a large provider of such laboratory testing for dialysis patients.

33. NNA is far and away ESRD's largest source of referrals.

34. ESRD performs the vast majority of testing for NNA because of illegal (under the Federal Medicare and Medicaid Anti-Kickback Statute, 42 U.S.C. 1320a-7b, as set forth more fully below) exchanges of value between and among Tannenbaum, NNA, ESRD, and the Ginsburg family.

35. When NNA has added additional dialysis sites, they have directed patient lab work to ESRD, sometimes over the objections of local physicians pursuant to the illegal kickback behavior described

herein, and the large majority of such lab work has been paid directly or indirectly, by the Federal Government.

36. The willfulness of these defendants in defrauding the government is evidenced in part by the elaborate subterfuges undertaken in an effort to disguise their involvement, as described more fully below.

37. Tannenbaum is a shareholder in NNA, and for all relevant periods, has also been the chairman and chief executive officer of NNA.

38. The Ginsburg family, including, but not limited to, Mark Ginsburg, Scott Ginsburg, and/or Rikki Robinson, possesses a direct and/or indirect ownership and/or beneficial interest in ESRD.

39. Mark Ginsburg occupies an office at the headquarters of ESRD.

40. Mark Ginsburg goes to that office virtually every working day.

41. Mark Ginsburg is the person who runs ESRD, either directly or indirectly, and has so represented himself.

42. ESRD arranged to provide virtually all the laboratory services to NNA's dialysis patients in exchange for an investment by the Ginsburg family in one of the companies run by Tannenbaum.

43. ESRD is doing, and has for all periods relevant hereto has done, all or most of the laboratory work for NNA and for patients of NNA.

44. NNA and referrals from NNA are the largest sources of income for ESRD.

45. The large majority of this laboratory work has been, and is, paid, directly or indirectly, with and by Medicare funds.

46. This laboratory work is illegally referred to NNA because of kickbacks from Mark Ginsburg and/or his family and/or ESRD, to Tannenbaum, NNA and/or affiliated companies.

47. ESRD and NNA bill Medicare, either directly or indirectly, for the laboratory services ESRD performs for NNA-referred dialysis patients.

48. Each and every laboratory charge to the Medicare Program by ESRD and/or NNA relating to these NNA referred patients constitutes a separate violation of Federal law, because each and every laboratory service performed by ESRD and paid for by the Federal Government is the result of an illegal kickback scheme.

49. Scott Ginsburg has conspired with Mark Ginsburg to conceal Mark Ginsburg's involvement with ESRD.

50. Scott Ginsburg is in the communications and broadcast industry in Texas.

51. Scott Ginsburg is the nominal head of ESRD, which in reality is run by Mark Ginsburg, who is a physician, in Florida, where ESRD is located.

52. The individual actions of the brothers described herein are attributable to each other, because they have acted in concert and/or as part of a conspiracy.

53. The defendants have engaged in a course of conduct designed to avoid exposure of their illegal self-enrichment at the expense of Medicare, evidencing the willfulness of their actions.

54. The Draconian lengths to which Mark Ginsburg has gone in an effort to conceal his illegal involvement in the scheme to defraud the United States of Medicare funds was demonstrated in the actions of ESRD Laboratories employees in connection with efforts to serve a federal civil subpoena duly issued on March 6, 2002 by the United States District Court for the Southern District of Florida compelling Mark J. Ginsburg and the custodian of records of Royco, Inc. d/b/a ESRD Laboratories to appear for a deposition with respect to *Michael Tomlin and the Tomlin Company v. IMRAC Corporation, et al.*, Case No. 3-02-0016, Middle District of Tennessee.

55. True and exact copies of said Subpoenas are attached hereto as **Exhibit A**.

56. On March 7, 2002, while serving the Subpoenas (**Exhibit A**) on Mark Ginsburg and on the custodian of records ESRD in Ft. Lauderdale, Florida, Randall L. Bostic, Jr, was assaulted by Bill Janda, an officer and agent of both ESRD Laboratories and of Mark Ginsburg.

57. Janda belligerently claimed to "refuse" service of the Subpoenas. Affidavit of Randall L. Bostic, Jr., attached hereto as **Exhibit B**.

58. ESRD's and Mark Ginsburg's agent Janda, apparently responding to the wishes of his superiors, angrily accosted Bostic, asserting that he, Janda, would not accept service "because the messenger would get fired." (Bostic Affidavit, ¶ 9).

59. This demonstrates:

a. Mark Ginsburg has an office at ESRD headquarters.

b. Mark Ginsburg has authority over hiring and firing at ESRD headquarters.

c. Mark Ginsburg does not want to be questioned under oath about NNA or ESRD.

d. Mark Ginsburg has contempt for the law and legal process.

60. As a result, Mr. Janda told Mr. Bostic that neither Mr. Janda nor anyone else in the building would touch the papers. (Bostic Affidavit, ¶ 9).

61. When Bostic attempted to leave the subpoena on Janda's desk, Janda physically assaulted Bostic, cursing him and shoving the Federal Court issued subpoena down Bostic's shirt. (Bostic Affidavit, ¶¶ 11 -13).

62. Because Bostic was duly authorized pursuant to Federal Rule of Civil Procedure 45(b) to serve the subpoena attached as **Exhibit A**, the actions of Janda violate 18 U.S.C. § 1501, imposing criminal sanctions upon anyone who assaults any person duly authorized to serve an order or other court-issued process, including the attached subpoenas.

63. Mark Ginsburg is criminally liable for the actions of Janda. Under 18 U.S.C. § 1501, any person who aids or abets any other person in violating 18 U.S.C. § 1501 is also guilty of obstructing justice.

64. When this assault occurred on March 7, 2002, Ginsburg knew about the complaint filed against Jerome Tannenbaum and NNA in *Michael Tomlin and the Tomlin Company v. IMRAC Corporation, et al.*, Case No. 3-02-0016, Middle District of Tennessee.

65. Attached to this motion as **Exhibit C** is a copy of a letter dated November 18, 2001 from Dr. Ginsburg to Norman "Sandy" Ginsberg. (Mark Ginsburg is not related to Norman Ginsberg.) **Exhibit C** establishes

that Dr. Ginsburg knew, and was concerned, about the allegations in the lawsuit and their impact on him and his family.

66. In **Exhibit C**, Mark Ginsburg acknowledges that Tannenbaum received financial support from Mark Ginsburg's family and issues threats related to prosecution of the lawsuit which promises to expose his involvement in the scheme.

67. After *Michael Tomlin and the Tomlin Company v. IMRAC Corporation, et al.*, Case No. 3-02-0016, Middle District of Tennessee was filed, Mark Ginsburg claimed to the attorney of the Relator that he is not associated with ESRD. *See, Affidavit of G. Thomas Nebel* (**Exhibit D**).

68. In his letter of November 18, 2001 to Norman Ginsberg (**Exhibit C**), Mark Ginsburg also claims that the laboratory is "[his) sibling's company."

69. Mark Ginsburg's letter, **Exhibit C** was sent by Federal Express on an account paid for by ESRD.

70. Mark Ginsburg claims that he has no interest in ESRD Laboratories only because, if his interest is revealed, he is exposed as having violated the Federal Medicare Anti-Kickback statute (42 U.S.C. § 1320a-7b) and other Federal laws.

71. On other occasions, as demonstrated below, Mark Ginsburg, has admitted his involvement with ESRD.

72. The circumstances pointing to his essential involvement with ESRD, including his assertion within the context of litigation that he has no such involvement after publicly indicating otherwise and his efforts to avoid process compelling him to testify about said involvement, evidence an awareness on Mark Ginsburg's part that he is violating federal law, and is doing so knowingly and willfully.

73. Attached hereto as **Exhibit E** is the deposition of Kimberly Jean Hannah (Tannenbaum's secretary) taken on February 21, 2002.

74. In her capacity, she handles Tannenbaum's personal banking.

75. She testified in her deposition that Mark Ginsburg "either runs or works for ESRD Laboratory in Florida." (Deposition of Hannah, p. 50, line 21 through p. 51, line 1).

76. Hannah also testified that Ginsburg wired $750,000 to Tannenbaum on October 18, .2001. (Deposition of Hannah, p. 114, line 1 through p. 119, line 11).

77. Attached hereto as **Exhibit F** is a copy of the October 18, 2001 wire transfer in the amount of $750,000.00. At page 119, this wire transfer is referred to as part of Collective No. 12 to Ms. Hannah's deposition.

78. Also attached hereto as **Exhibit G** is an excerpt from Washington University's Annual Report 2000-2001, which profiles Mark Ginsburg.

79. In this excerpt, Mark Ginsburg states "I take care of about 16,000 patients who are on dialysis" at the clinical laboratory that he runs. This is ESRD Laboratory.

80. As set forth in Nebel's Affidavit (**Exhibit D**), Nebel has interviewed a former officer of defendant National Nephrology Associates who has told Nebel that ESRD does virtually all of National Nephrology Associates's laboratory business in exchange for an investment that ESRD or its owners made in NNA or related companies.

81. This "arrangement" violates the Federal Anti-Kickback statute because over 80% of all medical services provided by Defendant National Nephrology Associates are paid for with United States Medicare dollars.

82. Likewise, the vast majority of the laboratory services provided by ESRD are paid for with government dollars.

83. The $750,000.00 wire transfer from Ginsburg to Tannenbaum is an exchange of value for Tannenbaum's referral to ESRD of laboratory business of NNA patients, for which service payment is made with government dollars.

84. **Exhibit H** is a Confidential Property Division and Settlement Agreement signed by Tannenbaum relative to dissolution of marriage.

85. In **Exhibit H**, Tannenbaum has admitted (p. 10, ¶8A(ix) that at least $775,000.00, plus accrued but unpaid interest, is currently owing to Ginsburg.

86. In **Exhibit C**, Mark Ginsburg indicates the full amount loaned to Tannenbaum is over $800,000.00.

87. Mark Ginsburg recently demanded payment of over $1,500,000.00 owed by Tannenbaum and his family.

88. The exchange of value between these people and entities does not stop with the loan. Additional transactions include:

a. When a corporate officer of NNA, Joe Cashia, sought to place the laboratory work of NNA out for competitive bidding, he was informed by Kent Mahlke, President of ESRD, that ESRD had invested $150,000 at Tannenbaum's direction in a company affiliated with NNA in order to assure to ESRD the exclusive right to NNA's laboratory work.

b. ESRD has bought or is leasing software from IMRAC Corporation, an affiliate of NNA. These result in substantial payments being made to TMRAC by ESRD which are

made as part of the agreement to exchange money and other valuable consideration to NNA and Tannenbaum for referral of the laboratory business to ESRD.

c. Shareholders and/or officers of ESRD, including but not limited to Mark Ginsburg and other members of his family, have invested, directly or indirectly, through an entity, of which, on information and belief, Tannenbaum is a fiduciary, in NNA and/or its affiliates. Mark Ginsburg, the head of ESRD, is a beneficial owner of stock in NNA and/or its affiliates. The beneficial ownership is structured so as to disguise the Ginsburg family ownership.

d. Mark Ginsburg and/or his family funded the *Ginsburg v. Gambro AB* lawsuit and offered Tannenbaum the opportunity to benefit therefrom, as Ginsburg admits in his letter of November 11, 2001 (**Exhibit C**), and Tannenbaum has admitted his expectation of the receipt of benefits thereunder on page 12, ¶8 E.6 of **Exhibit H**.

e. ESRD and/or Mark Ginsburg have provided expensive transportation for free in aircraft owned by ESRD or Mark Ginsburg for the benefit of NNA, Tannenbaum, and their designees.

i. On or about the 20th of July, 2001, Mark Ginsburg took Tannenbaum and his mistress, Deborah Rota, to New Orleans, Louisiana, on his or ESRD's airplane.

ii. ESRD and/or Mark Ginsburg have leased a Hawker aircraft to NNA.

iii. The transactions described above were entered into, at below market rates, in exchange for NNA awarding its laboratory business to ESRD.

f. Upon information and belief, Mark Ginsburg and/or others associated with him, have invested funds in NNA and related entities in order to influence the referral of such business to ESRD Laboratories, also in violation of 42 U.S.C., Section 1320-7(b).

g. Based upon information and belief, other, sizeable amounts of funds have been exchanged between Mark Ginsburg and Tannenbaum as well.

89. Accordingly, ESRD and/or its officers, agents or shareholders, as described above, paid consideration to obtain the laboratory work of patients referred by NNA, a large portion of which (reasonably

believed to be between 80% and 90% of total patient lab work) was paid, directly or indirectly by Medicare.

90. Mark Ginsburg and other members of his family and other unnamed individuals have conspired to disguise Mark Ginsburg's true involvement with ESRD because Mark Ginsburg seeks to conceal the illegal nature of the activities.

91. Mark Ginsburg has a history of ignoring federal law for his own financial aggrandizement. In Civil Action No. 99-8694-CIV-RYSKANT (Southern District of Florida, West Palm Beach Division), a judgment was entered against Mark Ginsberg and his father, Jordan Ginsburg, requiring, among other things, that they pay over 4.7 million dollars to the Securities and Exchange Commission (**Exhibit I**).

92. Said Order arose out of charges by the Securities and Exchange Commission that Mark Ginsburg and Jordan Ginsburg received and traded on inside information delivered to them by Scott Ginsburg (**Exhibit P**).

93. Tannenbaum, too, has sought to conceal his involvement in the illegal transactions. Tannenbaum repeatedly frustrated the Plaintiffs' efforts in *Michael Tomlin and the Tomlin Company v. IMRAC Corporation, et al.*, Case No. 3-02-0016, Middle District of Tennessee, to take Tannebaum's deposition, despite the fact that Tannenbaum is a defendant in that action.

94. Tannenbaum's deposition was finally scheduled for March 27, 2002, but Tannenbaum (through counsel) canceled on March 26, 2002, as evidenced by the letter attached hereto as **Exhibit J**.

95. In response, on March 26, 2002, Plaintiffs (by counsel) requested an explanation of the basis for this refusal, with verification thereof, as described on **Exhibit K**.

96. Tannenbaum's response (through counsel) was to claim that a medical emergency involving the mother of a good friend prevented his attendance at this deposition, without any verification or detail whatsoever, as described in **Exhibit L**.

97. Based upon information and belief, no such medical emergency existed and Tannenbaum lied about the alleged medical emergency.

98. Steve Harrison is an executive officer and an employee for NNA and has been for all periods relevant hereto.

99. Steve Harrison has admitted knowing that the referral of patients arrangements between NNA and ESRD violated Federal law.

100. During approximately April of 1999, during a telephone call, Steven Harrison, an officer of NNA, and an officer of ESRD, acting in their respective capacities on behalf of Kent Mahlke, NNA and ESRD, discussed the

creation of a paper trail for the purpose of concealing these illegal activities.

101. Their conduct amounts to obstruction of justice under 18 U.S.C. § 1501.

102. The deposition of Steven Harrison was conducted on Friday, March 29, 2002, pursuant to notice, and after agreement among counsel as to the date and time. The deposition is attached hereto as Exhibit M.

103. Counsel for Relator asked Harrison the following Question:

Q. "How did ESRD come to do all or virtually all of NNA's lab work?" Deposition of Steve Harrison, p. 31, line 16 to line 17.

104. Counsel for NNA and Tannenbaum instructed Harrison not to answer this question on the grounds of relevance, as described in the deposition of Steve Harrison, p. 31, line 18 top. 32, line 17.

105. Harrison did not answer these questions consistent with the direction of NNA's and Tannenbaum's counsel.

106. Counsel for Relator sought to resolve this conflict and requested that he and counsel for NNA and Tannenbaum contact the Court by phone in an effort to resolve the issues posed by Harrison's refusal to testify, but counsel for NNA and Tannenbaum refused to

participate in a phone call to the Court. *Id.* p. 35, line 6 to p. 36, line 3.

107. Rule30(d)(1) of the *Federal Rules of Civil Procedure* specifically provides only three reasons for which a person may instruct another not to respond to a question during a deposition: "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)."

108. The reason given by the Defendants' counsel was not one of these three reasons.

109. This obstruction of discovery is especially egregious because the evidence sought at Harrison's deposition had already been determined to be relevant for discovery purposes.

110. Judge Hamilton Gayden, before whom the case was pending before its removal to federal Court, entered an Agreed Order (**Exhibit N**) specifically permitting discovery into the matters as to which the questions asked by the Relator's counsel herein were directed.

111. Counsel for Plaintiffs reminded defense counsel of Judge Gayden's Order at Harrison's deposition, but defense counsel continued to instruct his client not to answer on the already over-ruled grounds of relevance. (Deposition of Steve Harrison, p. 31, lines 21-24).

112. Attached hereto as **Exhibit O** are excerpts of an interview of Sheliah Wall conducted by Plaintiffs Counsel on July 14, 2001. Wall is formerly the girlfriend of Steve Harrison, the same NNA corporate officer who was deposed on March 29, 2002.

113. During her interview, Wall stated that Harrison asked Phil McSween, a partner in the law firm serving as defense counsel in the *Michael Tomlin and the Tomlin Company v. IMRLIC Corporation, et al.*, Case No. 3-02-0016, Middle District of Tennessee, how long defense counsel could "drag this [case] with Michael out," and Harrison told Wall that lawyer McSween said "Forever." **Exhibit O**, Interview with Sheliah Wall, p 15, lines 2 to 8.

114. Ms. Wall also stated that she and Mr. Harrison discussed whether Mr. Harrison could find "somebody to break [Plaintiff] Michael's [Tomlin] legs." **Exhibit O**, p. 15, lines 10-19.

115. All of this conduct by defendants indicate willfulness an knowledge on their part as the actions amounts to culpable conduct, awareness of guilt and an effort to conceal illegal conduct.

116. This conduct and/or pattern of conduct violates the federal Anti-Kickback Statute, 42 U.S.C. 1320a-7b(a), which states:

> (a) Making or causing to be made false statements or representations Whoever –

(1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a Federal health care program (as defined in subsection (f) of this section),

(2) at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment,

(3) having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized,

(4) having made application to receive any such benefit or payment for the use and benefit of another and having received it, knowingly and willfully converts such benefit or payment or any part thereof to a use other than for the use and benefit of such other person,

(5) presents or causes to be presented a claim for a physician's service for which payment may be made under a Federal health care program and knows that the individual who furnished the service was not licensed as a physician, or

(6) for a fee knowingly and willfully counsels or assists an individual to dispose of assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance under a State plan under subchapter XIX of this chapter, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1396p(c) of this title,

shall (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of

items or services for which payment is or may be made under the program, be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned for not more than five years or both, or (ii) in the case of such a statement, representation, concealment, failure, conversion, or provision of counsel or assistance by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year, or both. In addition, in any case where an individual who is otherwise eligible for assistance under a Federal health care program is convicted of an offense under the preceding provisions of this subsection, the administrator of such program may at its option (notwithstanding any other provision of such program) limit, restrict, or suspend the eligibility of that individual for such period (not exceeding one year) as it deems appropriate; but the imposition of a limitation, restriction, or suspension with respect to the eligibility of any individual under this sentence shall not affect the eligibility of any other person for assistance under the

plan, regardless of the relationship between that individual and such other person.

117. This conduct and/or pattern of conduct also violates 42 U.S.C. 1320a-7b(b) of the federal Medicare and Medicaid Anti-kickback statute, which provides:

(b) Illegal remunerations

(1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind –

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person –

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

118. ESRD, Mark Ginsberg, Tannenbaum, and NNA, together with others, have knowingly presented

and/or caused to be submitted claims under Medicare to the United States Government for payment or approval under the Medicare program for laboratory services which ESRD provided to kidney dialysis patients of NNA, as described above.

119. In submitting these claims, NNA, Mark Ginsburg, Tannenbaum, and/or ESRD explicitly or implicitly represented that they complied with applicable law dealing with the provision of healthcare services in connection with the services for which payment was sought, and the payment of such claims under the Medicare program Was conditioned upon the compliance with such applicable law.

120. These claims were false and/or fraudulent, because the conduct of NNA, Mark Ginsburg, Tannenbaum, and ESRD, as described above, violated federal law, including but not limited to the federal Medicare and Medicaid Anti-kickback statute, 42 U.S.C. § 1320a-7b.

121. These claims were false or fraudulent, because federal law prohibits the presentation or causing to be presented a Medicare claim for services furnished pursuant to a prohibited referral in violation of 42 U.S.C. Section 1320a-7b (such as the referral described above), and bars payment of Medicare claims for services rendered in violation of such federal law, including but not limited to 42 U.S.C., §§ 1395nn(a)(1), and (g)(1)[1].

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[1] § 13951nn. Limitation on certain physician referrals

(a) Prohibition of certain referrals

(1) In general

Except as provided in subsection (b) of this section, if a physician (or an immediate family member of such physician) has a financial relationship with an entity specified in paragraph,(2), then –

(A) the physician may not make a referral to the entity for the furnishing of designated health services for which payment otherwise may be made under this subchapter, and

(B) the entity may not present or cause to be presented a claim under this subchapter or bill to any individual, third party payor, or other entity for designated health services furnished pursuant to a referral prohibited under subparagraph (A).

. . . .

(g) Sanctions

(1) Denial of payment

122. In submitting these claims, NNA, Ginsburg, Tannenbaum, and ESRD explicitly or implicitly represented that they were entitled to payment of these claims under the Medicare program.

123. NNA, Ginsburg, Tannenbaum, and/or ESRD were not entitled to payment under the Medicare program for the claims which they submitted, as described above, because of their knowing and willful violation of applicable law, including, but not limited to the federal Medicare and Medicaid Anti-Kickback statute, 42 U.S.C. Section 1320a-7b, and, therefore, the claims they submitted were false.

124. NNA, Mark Ginsburg, Scott Ginsburg, Tannenbaum, and ESRD were under a duty to disclose the compensation paid for referrals and the financial relationships described above, but knowingly and intentionally failed to do so,. thereby rendering the statements and claims made by them false and fraudulent.

125. These claims constituted false claims under the federal False Claims Act, 31 U.S.C. §3729(a).

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> No payment may be made under this subchapter for a designated health service which is provided in violation of subsection (a)(1) of this section.

126. ESRD, Mark Ginsburg, Scott Ginsburg, Tannenbaum, and NNA knew that said claims filed by them were false.

127. The submission by NNA, Mark Ginsburg, Scott Ginsburg, Tannenbaum, and ESRD, of claims for services, in connection with which there had been a violation of federal law, including violation of the federal Medicare and Medicaid Anti-Kickback statute, 42 U.S.C. § 1320a-7b, constituted the submission of false claims prohibited by the federal False Claims Act, 31 U.S.C. § 3729(a).

128. ESRD, Mark Ginsburg, Scott Ginsburg, Tannenbaum, and NNA, with others, have conspired together to defraud the United States Government by submitting and getting paid for these false claims, or by facilitating the payment of the false or fraudulent claims for the laboratory services described above.

129. These payments were made by the United States through the Medicare program, when defendants knew that the payment of such claims violated federal law.

130. NNA, Mark Ginsburg, Scott Ginsburg, Tannenbaum, and ESRD were not entitled to payment under the Medicare program for the claims which they submitted, as described above, because of their violation of applicable law, including 42 U.S.C. Section 1320a-7b, and, as such, payment of these claims resulted in a financial loss in the millions of dollars to the Untied States of America.

131. Because ESRD, Mark Ginsburg, Scott Ginsburg, Tannenbaum, and NNA conspired together with each other and others, EM, Tannenbaum, NNA, Mark Ginsburg and Scott Ginsburg are jointly and severally liable for not only the false claims submitted by ESRD but also the false claims submitted by NNA.

132. ESRD, Mark Ginsburg, Scott Ginsburg, NNA, and Tannenbaum:

a. knowingly presented or caused to be presented to an officer or employee of the United States Government the false or fraudulent claims described above for payment or approval;

b. knowingly made, used, or caused to be made a false statement or statements to get the false or fraudulent claims described above paid or approved by the United States Government;

c. conspired with each other and others to defraud the United States Government by submitting and getting paid false or fraudulent claims; and

d. knowingly made false statements in order to get false or fraudulent claims paid.

*WHEREFORE* plaintiff prays for judgment against defendants, and each of them, as set forth more fully below.

## FALSE CLAIMS RE 9/11

133. On September 11, 2001, Tannenbaum was in Boston on behalf of NNA to meet with representatives of J. W. Childs Associates, L.P. and Indosuez Capitol, the largest shareholder and investment banker for NNA.

134. Tannenbaum, acting both as an agent of NNA and in his individual capacity, contacted the Federal Aviation Administration (FAA) by telephone and told that Federal agency that he was a member of the Vanderbilt Emergency Response Team.

135. This constituted the knowing submission of a claim to an officer or employee of the Government for approval of said claim.

136. The Vanderbilt University Medical Center and its Emergency Response Team had been alerted that Vanderbilt might receive some anticipated bum victims from these terrorists attacks and was on a Code Yellow alert status.

137. In fact, Tannenbaum was not a member of the Vanderbilt Emergency Response Team and said claim was false, and known to be false by Tannenbaum when the claim was made.

138. In order to deceive the FAA, on information and belief, Tannenbaum also made an interstate telephone call to a representative at Vanderbilt.

139. The telephone call, on information and belief, was made by Tannenbaum to ask Vanderbilt's representative to lie to the FAA and confirm to the FAA that Tannenbaum was a member of the Vanderbilt Emergency Response Team, when in fact he was not.

140. The purpose of this deception was to enable Tannenbaum to secure permission from the FAA to fly the NNA jet from Boston to Nashville, which constitutes a property right, because, although commercial and private flights had been grounded, the FAA would allow Tannenbaum to fly to Nashville if necessary in order for Vanderbilt to assemble its Emergency Reference Team.

141. On September 11, 2001, the date of one of this nation's greatest tragedies, Tannenbaum fraudulently submitted the claim described above to an officer or employee of the Federal Government for the purpose of enabling Tannenbaum to engage in interstate travel from Boston to Nashville.

142. Tannenbaum was in Boston on September 11, 2001, in furtherance of his duties as an agent and as chief executive officer of NNA and his conduct as described herein was perpetrated as an agent and officer of NNA.

143. The jet he traveled on from Nashville to Boston and back was owned by NNA and all expenses of this trip were paid by NNA.

144. The tail number of this jet was 41 IPA.

145. Tannenbaum's false claim was in fact approved by the Federal Government, and he was not only permitted to fly from Boston to Nashville in contravention of Federal prohibitions against such travel, but the Federal Government provided a military aircraft escort for said trip, at the expense of the Federal Government.

146. Upon returning to Nashville, Tannenbaum bragged about deceiving the FAA and how his deception enabled him to fly on NNA's jet from Boston to Nashville when other private aircraft had been grounded.

147. The Federal Government has expended considerable sums of money for said military escort, which was furnished as a direct and proximate result of Tannenbaum's claim for which it has not been paid.

148. NNA and Tannenbaum knowingly presented or caused to be presented to an officer or employee of the United States Government the false or fraudulent claim described above for approval.

WHEREFORE Plaintiff respectfully requests:

1. That a judgment be entered against the Defendants in the amount of the false claims paid, and the amount expended for the military aircraft escort described above;

2. That the amount of such judgment be trebled pursuant to 31 U.S.C. Section 3729(a);

3. That a civil penalty in an amount not less than $5,000.00, nor more than $10,000.00, per violation be imposed upon the Defendants;

4. That judgment be entered against the Defendants and in favor of Tomlin for attorneys fees and expenses reasonably incurred, as permitted by 31 U.S.C. Section 3730(d).

5. That this Court award Tomlin a percentage of the judgment entered against the Defendants as provided by 31 U.S.C. Section 3730(d).

6. That NNA and ESRD each be barred from further participation in the Medicare Program.

7. That this Court grant such other and further relief, in law or equity, to which Plaintiff and/or Realtor may be entitled.

**A jury to try this cause is respectfully requested.**

Respectfully submitted,

/s/

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